

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LEE COLLETT,

Defendant-Appellant.

UNPUBLISHED

March 9, 1999

No. 201447

Crawford Circuit Court

LC No. 96-001455 FH

Before: White, P.J., and Markman and Young, Jr., JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of prisoner in possession of contraband, MCL 800.281(4); MSA 28.1621(4), and the four to seven year sentence, which reflected an habitual offender, second offense enhancement under MCL 769.10; MSA 28.1082. Defendant, who was an inmate at the Camp Lehman Correctional Facility, was charged after a strip search which revealed that he was in the possession of marijuana. We affirm.

Defendant first argues that his constitutional protection against being placed in double jeopardy as guaranteed by the Fifth Amendment to the United States Constitution and art 1, § 15 of the Michigan Constitution was violated when he was retried on the same “prisoner in possession” charge after his first trial resulted in a hung jury and a mistrial. We disagree. The trial court’s ruling regarding a double jeopardy issue is a question of law to be reviewed de novo on appeal. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). A criminal defendant may not be twice placed in jeopardy for a single offense. US Const, Amendment V; Mich Const 1963, art 1, §15. When a defendant exercises the right to trial by jury, jeopardy generally attaches at the time the jury is selected and sworn. *People v Booker (After Remand)*, 208 Mich App 163, 172; 527 NW2d 42 (1994). If the trial is concluded prematurely, a retrial for that offense is prohibited unless: (1) the defendant consented to the interruption; or (2) a mistrial was declared because of manifest necessity. *Id.* One circumstance that constitutes manifest necessity is the jury’s failure to reach a unanimous verdict. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). When this occurs, and the trial court declares a mistrial, a retrial is not precluded because the original jeopardy has not been terminated, i.e., there has not been an assessment of the sufficiency of the prosecution’s proofs. *Id.* at 4-5, citing *People v Thompson*, 424 Mich 118; 379 NW2d 49 (1985), and *Richardson v United States*, 468 US 317; 104 S Ct 3081; 82

L Ed 2d 242 (1984). MCR 2.512(C)(3) states that a trial court may discharge a jury “whenever the jurors have deliberated until it appears that they cannot agree,” but does not require that the jury deliberate for a certain period of time or that a jury must be instructed to return to deliberations a specified number of times.

In this case, the jury in the first trial indicated to the trial court that it could not reach a unanimous verdict. The trial court told the jurors that they had not deliberated for very long and instructed them to return to deliberations in an attempt to resolve their differences. When the jury again indicated that it was unable to reach a unanimous verdict, neither party objected when the trial court declared a mistrial. Under the facts of this case, where the factual dispute was not unduly complicated and the jury was instructed to return to deliberations before it again reported that it could not reach a unanimous verdict, we believe that the trial court did allow the jury a reasonable amount of time to reconsider their verdict before declaring a mistrial. Thus, defendant’s retrial did not place him in double jeopardy.

Next, defendant argues that the trial court erred in denying his motion to have a special prosecutor appointed. He brought the motion because the Crawford County prosecuting attorney, before being elected to public office, represented defendant’s wife in their divorce and obtained a civil judgment for attorney fees against defendant. This judgment, argues defendant, created a conflict of interest necessitating the appointment of a special prosecutor. After reviewing the trial court’s decision regarding the existence of a conflict of interest under the clearly erroneous standard, *People v Doyle*, 159 Mich App 632, 641; 406 NW2d 893 (1987), modified on rehearing 161 Mich App 743 (1987), we disagree with defendant’s position. The ability of a court to appoint a special prosecutor is governed by statute. *In re Appointment of Special Prosecutor*, 122 Mich App 632, 634; 332 NW2d 550 (1983). The exclusive source of the trial court’s authority to appoint a special prosecutor in lieu of the county prosecutor is MCL 49.160; MSA 5.758. The statute permits such an appointment only when (1) the prosecuting attorney “is disqualified by reason of conflict of interest”; or (2) “is otherwise unable to attend to the duties of his office.” MCL 49.160(1); MSA 5.758(1).

Case law involving the disqualification of prosecutors because of a conflict of interest falls into two main categories. *Doyle, supra* at 641. The first involves disqualification for conflicts arising from a professional attorney-client relationship, such as when the prosecutor has become privy to confidential information. *Id.* The second encompasses those situations in which the prosecutor has a personal, financial or emotional interest in the litigation or with the accused. *Id.* When the conflict involves the elected county prosecutor, the entire prosecutor’s office must recuse itself because assistant prosecuting attorneys act on behalf of the elected prosecutor. *Doyle, supra* at 644.

In the present case, the alleged conflict involved the elected prosecuting attorney; therefore, if indeed there did exist a conflict, the entire prosecutor’s office should have recused itself; merely allowing an assistant prosecuting attorney to try the case would not have rectified the situation. *Doyle, supra* at 644. We find, however, that any existing conflict based on financial or personal interests was eliminated by the dismissal of the prosecutor’s \$272 civil judgment against defendant.¹ Moreover, the prosecutor never had an attorney-client relationship with defendant and was not privy to any confidential information about him. Accordingly, the trial court’s finding that no conflict of interest existed between

defendant and the prosecutor was accurate and the appointment of a special prosecutor was not required.

Next, defendant argues that the trial court improperly penalized him for asserting his right to trial by imposing a longer sentence subsequent to trial than was originally offered in a proposed plea bargain. In such plea negotiations, the trial court indicated that an appropriate sentence would be twelve months; however, after the jury trial conviction, the trial court sentenced defendant to four to seven years.

In *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993), the Supreme Court specifically allowed trial courts to alter their preliminary sentence evaluations and emphasized that the preliminary evaluations in no way restricted trial courts' discretion in sentencing. *Id.* The Court also recognized that "additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, and from other sources" that would lead a court ultimately to impose a longer sentence. *Id.* The trial court in this case may have become privy to additional facts during the trial or from the presentence report that led it to alter its initial sentence evaluation. Further, although the county prosecutor apparently withdrew the original plea offer with a sentence recommendation of twelve months' imprisonment, defendant subsequently rejected a new proposed plea offer in which the prosecutor agreed to recommend an eighteen month sentence but nevertheless to talk to the court about limiting the actual sentence to twelve months' imprisonment.² Because defendant never accepted the plea proposal, the court was never placed in the position of having to decide whether it could abide by the agreement after reviewing a presentence report. Therefore, the court's preliminary sentence evaluation became irrelevant. Thus, the trial court did not abuse its discretion in sentencing defendant to four to seven years in prison.

Finally, defendant argues that the trial court abused its discretion by sentencing defendant to a disproportionate sentence of four to seven years.³ After reviewing the trial court's imposition of this sentence for an abuse of discretion, *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), we disagree. Although given discretion in sentencing matters, the trial court is required to impose a sentence that is proportionate to (1) the seriousness of the crime; and (2) the defendant's prior record. *Id.* at 650. In the context of sentencing habitual offenders, the Supreme Court held in *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997):

We believe that a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society. [*Id.* at 326.]

In light of (1) the serious nature of defendant's offense, given its effects on prison security; (2) defendant's lengthy prior criminal record; and (3) the fact that the trial court sentenced defendant to a term of years within the statutory range, we conclude that the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Helene N. White
/s/ Stephen J. Markman
/s/ Robert P. Young, Jr.

¹ Indeed, it would seem that if the prosecutor truly desired to execute on his civil judgment against defendant, the avenue for accomplishing this would hardly be to incarcerate defendant so that his likelihood of income would be substantially reduced.

² The trial court explained that after defense counsel, an assistant prosecutor and the court discussed a “negotiated plea and sentence” in which the sentence would be twelve months’ imprisonment, the county prosecutor called the court to explain that the policy of the prosecutor’s office was not to agree to a “maximum/minimum of less than eighteen (18) months, but that he recognized that the Court could and would sentence as it thought appropriate and he would not . . . object if the sentence of the Court was as the Court indicated it was disposed to impose . . .”

³ At oral argument on appeal, defendant withdrew his argument that the trial court erred when it credited defendant’s sentence for 126 days as opposed to 616 days, which represented the time from his parole eligibility on a prior sentence until the time of sentencing on the instant offense. Thus, we do not address this issue.